purchasers for a substantial quantity of commodities of like grade and quality. Is illegality to be *conclusively inferred*, irrespective of what the effect might *actually* be? Or suppose that the same rule here laid down is applied to corporation A which acquires "the whole *or any part of the stock*" of corporation B, a competitor. Is illegality to be *conclusively inferred*, irrespective of what the effect might *actually* be? If, as Representative Floyd pointed out,[8] the language of the "substantially-lessen-competition" clause in Sections 2 and 3 was taken over from Section 7 of the Act, then is it reasonable to assume that the same criteria of interpretation must be used in dealing with all three sections? If the Court's interpretation of Section 3 is applied to Sections 2(a) and 7, the area of innovation and confusion is immeasurably expanded.

V.

The Court's Interpretation of Section 3 of the Clayton Act Works a Hardship Not Only on Suppliers but on a Multitude of Small Dealer Purchasers.

It is respectfully urged that the Court re-examine the problem from the standpoint of the individual dealer. The Court's opinion recognizes the advantages of requirements contracts to a small buyer, like the service station dealer.[9] But at the conclusion of the opinion the Court says:

> "If in fact it is economically desirable for service stations to confine themselves to the sale of the

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[8]See footnote 5.

[9]The Court's opinion says (p. 13):

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. *In the case of the buyer*, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand."

petroleum products of a single supplier, they will continue to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere." (pp. 20, 21)

This, it is respectfully urged, does not solve the problem of the small dealer to whom an assured future supply is a matter of vital importance. In his business, survival may often depend on an assured future supply, especially in times of scarcity.

Of course there was competition with Standard for the patronage of the dealers. This fact was demonstrated. (See Brief of Appellants, pp. 87 to 89.) A dealer was free to contract with Standard, or any one of a large number of other suppliers. A dealer was free to select the kind of Standard contract he desired.

But having once made up his mind to contract with Standard, rather than some other supplier, and desiring a requirements contract *in order to be assured of a future supply*, how would it be legally possible for the dealer to say to Standard, "I will contract to buy all my requirements of gasoline from you over a period of six months. Of course you agree to sell me that gallonage. However, if I find I want to purchase any of my requirements from one of your competitors, I shall be free to do so." Such an arrangement would be no contract at all. A contract to buy and sell, not only obligates the seller to sell, *but obligates the buyer to purchase.* Otherwise there is no enforceable contract. If, as is the case with a great many dealers, a requirements contract is desired by the dealer to guarantee him an assured future supply, the dealer must agree to buy his requirements from the contract supplier if he is to be in a position to legally enforce an obligation

IN THE

Supreme Court of the United States

October Term, 1948.

No. 279.

279

STANDARD OIL COMPANY OF CALIFORNIA and STANDARD STATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of California

PETITION FOR REHEARING.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

TEXTBOOKS

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No. 279.

STANDARD OIL COMPANY OF CALIFORNIA and STANDARD STATIONS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellants, Standard Oil Company of California and Standard Stations, Inc., respectfully petition for a rehearing upon the grounds hereinafter stated.

Appellants believe that there are errors in the Court's opinion; that these errors will inevitably have disastrous repercussions; and that the public interest involved, in addition to the hardship to appellants and numerous service station dealers, should prompt the granting of a rehearing.

The issue is stated in the opinion at the outset as follows:

> "The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be to substantially lessen competition' may be met simply by proof that a substantial portion of

commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish." (p. 6)

The Court adopts the first alternative.

The Court's conclusion that Standard's contracts violate Section 3 of the Clayton Act seems to be based upon the fear that should the government be required to prove (as the statute plainly requires) that the effect of the contracts may be to substantially lessen competition, this would be a matter presenting "serious difficulties" (p. 15) and would require a "standard of proof . . . . . most ill-suited for ascertainment by courts" (p. 16). The Court states that to require the government to show that competition might be lessened would be to "stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition" (p. 20).

I.

In Interpreting Section 3 of the Clayton Act,[1] the Court Has Misapprehended the Congressional History of That Section.

To support its interpretation of Section 3 the Court adverts to the Congressional history of that section.

The Court's opinion states that the qualifying language in Section 3 "was added only *after a flat prohibition of tying clauses and requirements contracts had passed both Houses of Congress*" (p. 19).[2] It is respectfully urged that the Court is misinformed.[3]

Section 4 of the original Clayton bill as it passed the House was much like present Section 3 of the Clayton Act, except that it did not contain the *qualifying clause* "where the effect of such . . . contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce," and except that it contained a criminal

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[1]Section 3. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (38 Stat. 731; 15 U. S. C. 14.)

[2]Italics throughout this petition have been supplied.

[3]We do not mean misinformed by counsel. Neither counsel for the government nor counsel for appellants either in their briefs or in oral argument mentioned the Congressional history of this section.

penalty. (See Senate Report No. 698, 63d Cong. 2d Session, p. 56.)

When this Clayton bill reached the Senate it went to the Senate Committee on the Judiciary. This committee reported the bill to the Senate with certain changes, *i. e.*, the insertion of the words "or contract for sale," the insertion of the words "whether patented or unpatented," and the elimination of the criminal penalty. (See Senate Report No. 698, 63d Cong. 2d Session, p. 56.)

On the floor of the Senate *this section was entirely eliminated from the bill* (see Vol. 51, Part 14, Cong. Rec., pp. 13849, 14223, 14272, 14273) and the Senate *adopted a substitute section,* drawn by Senator Walsh, applicable *only to patented articles* and prohibiting the use of tying clauses in connection with patented articles upon criminal penalties, the criminal penalty provision being added by an amendment offered by Senator Reed (see Vol. 51, Part 14, Cong. Rec., pp. 14273, 14274, 14275, 14276 and the remarks of Senator Reed in Vol. 51, Part 16, Cong. Rec., p. 15818). This amendment was offered to meet the decision of this Court in *Henry v. A. B. Dick Company,* 224 U. S. 1[4] (see Vol. 51, Part 16, Cong. Rec., p. 15818; also Henderson, "The Federal Trade Commission," pp. 30 and 31).

Thus, up to the time that the bill went to the Conference Committee of both Houses, the House had approved a section similar to present Section 3 of the Clayton Act, except that it omitted the qualifying clause and contained

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[4]This decision had upheld the validity of a *tying clause* whereby a manufacturer of a *patented* mimeograph machine had required licensees to use with such machine only such stencil paper, ink, and other supplies as were purchased from such manufacturer.

a criminal penalty, but the Senate had approved a different section *applicable only to patented articles* and containing a criminal penalty.

The Conference report (see Senate Document No. 585, 63d Cong. 2d Session, p. 4) inserted for the first time the qualifying clause, eliminated the criminal penalty, and the section then went to both Houses of Congress and was passed in the form in which Section 3 now appears in the Act.

The Court's opinion further states that the "conferees responsible for adding that language [*i. e.*, the qualifying clause] were at pains, in answering protestations that the qualifying clause seriously weakened the section, to disclaim any intention seriously to augment the burden of proof to be sustained in establishing violation of it" (p. 19).

It is respectfully urged that a re-examination of the discussion in Congress of this section after it came from the Conference Committee will not support this conclusion. The debate in the Senate was extensive. (See Vol. 51, Part 16, Cong. Rec., p. 15818, *et seq.*) The proceedings in the House were not so lengthy. (See Vol. 51, Part 16, Cong. Rec., p. 16317.) It appears that the primary purpose of this particular section of the bill was to denounce "tying contracts in general. This is the device by which a manufacturer controlling a patented or staple article compels all who purchase or lease it to agree to purchase other goods or supplies from the seller, thus aiding him in restraining the trade of rivals and enabling him to create a monopoly." (Remarks of Senator Reed, Vol. 51, Part 16, Cong. Rec., p. 15819.) The reasons for

the addition of the qualifying clause in the Conference Committee were explained by Representative Floyd, who was one of the managers in the Conference Committee on the part of the House. From his explanation it appears that this qualifying clause was put in Sections 2 and 3 because it had been previously approved by both the House and the Senate in Section 7, and that this language originated from the discussion in the opinion of this Court in the *Addyston* case (175 U. S. 211).[5]

It is earnestly submitted that the interpretation of Section 3 now announced by this Court was not within the contemplation of those who enacted this measure, and that this will be shown by a re-examination of the proceedings of Congress after the bill left the Conference Committee. Obviously the limits imposed upon a petition for rehearing preclude any such attempt at re-examination in this petition.

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[5]Representative Floyd said:

"We have been criticized for injecting or inserting certain words into sections 2 and 3 in conference. Where did those mysterious words 'substantially lessen competition or tend to create a monopoly' originate? They were incorporated in section 8, the holding-company provision of the bill, as it passed this House. They passed muster in the Senate of the United States and were retained in the holding-company provision as it passed the Senate and were retained in conference. In modifying and changing sections 2 and 3, so as to make the acts prohibited therein unlawful, without making them penal, it became necessary to change the wording of each, in other respects. We took the language that had been already approved by both the House and the Senate in another section, the one relating to holding companies, and applied it to sections 2 and 3, the latter corresponding to our section 4, so that the three sections, namely, sections 2, 3, and 7 of the conference report, are in harmony now, all dealing with the question of contracts, the same principle being applied to each one of them.

"The gentleman from Minnesota [Mr. Volstead] criticizes this language and criticizes these provisions, claiming that we are in some way interfering with the operations of the Sherman anti-trust law; at least he fears we are. Not at all. That

II.

The Court's Interpretation of Section 3 of the Clayton Act Gives No Efficacy to the Words "Lessen Competition." It Interprets the Section as if Congress, Instead of Saying "Where the Effect of Such . . . Contract . . . May Be to Substantially Lessen Competition," Had Used the Words "Where Such Contract Affects a Substantial Part of Commerce."

It is respectfully urged that Section 3 does not say that the contracts are invalid if they "affect" a substantial portion of commerce. It says *"where the effect of such . . . contract or such condition, agreement or understanding may be to substantially lessen competition . . ."* The word "substantially" is used in the section to modify

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language did not originate with our committee. That language originated from a discussion in the opinion of the Supreme Court of the United States in the case of the Addyston Pipe & Steel Co. against United States. The court, in discussing this very question of contracts, uses this language. I quote:

"'But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective, among other things, of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States.'" (Vol. 51, Part 10, Cong. Rec., pp. 16317, 16318.)

the important words *"lessen competition." The Court's opinion gives no scope or weight to these words.*

Yet Congress must have intended these words to have some efficacy. The reasonable conclusion is that Congress by these words intended that there must be a factual inquiry to determine whether the contracts might have this prohibited "effect."

Congress in enacting this "effect" clause of Section 3, did not intend that a defendant should be denied all right to offer proof to show what the "effect" of the contract in question might be. If this had been the intent of Congress, it could easily have been expressed—not by the words which were used—but by saying: "where such contract affects a substantial portion of commerce."

The Court's interpretation of Section 3 alters the plain import of the "effect" clause of the section. It substitutes for the words *"where the effect of such . . . contract . . . may be to substantially lessen competition,"* the words (not found in the section) *"where such contract affects a substantial portion of commerce."*

III.

The Court in Applying Its Interpretation of Section 3 of the Clayton Act Indulges in Inferences Adverse to Standard, but Denies Standard the Right to Rebut Such Inferences.

The opinion recognizes that there has been no improvement in Standard's competitive position during the time it has used requirements contracts; that Standard is beset by the most vigorous kind of competition; that the duration of Standard's contracts is not excessive; and that Standard does not dominate the market (p. 15).

Yet the Court then proceeds to draw certain inferences adverse to Standard's position. Thus the Court says that "*it is possible* that" Standard's "position would have deteriorated but for the adoption" of the contracts (p. 15). Again it says that "*it would not be farfetched to infer* that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time . . . to prevent a late arrival from wresting away more than an insignificant portion of the market" (p. 16).

But surely, if *inference* is to be drawn upon for the purpose of showing that the contracts had the prohibited effect, Standard should have been *permitted to rebut such inference*. Yet here the District Court (A) excluded evidence which would have rebutted such inference,[6] and

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[6]The District Court said that it would sustain objections to any attempt by Standard to show what would be the effect on competition of the elimination of the requirements contracts generally or what change would occur in the over-all competitive picture through the elimination of such contracts. (See Brief of Appellants, pp. 43 to 47.)

(B) wholly disregarded evidence which was introduced for the purpose of showing the "effect" of the contracts. The District Court dealt with Standard's operations *in a vacuum*, despite evidence received and evidence offered but excluded.

To raise inferences against Standard and then to deny Standard the right to rebut such inferences is to deny a litigant the very essentials of justice.

If, as pointed out by Representative Floyd, the *Addyston* case was responsible for the use of the words "where the effect . . . may be to substantially lessen competition . . . ," then it *is perfectly clear that Congress did not intend to bar proof showing what the "effect" might be.* Thus, in the *Addyston* case (175 U. S. 211) it was said (p. 245):

> "It is the *effect* of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. *All the facts and circumstances are, however, to be considered* in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce."

The reason for denying Standard the right to rebut the inferences raised against its contracts seems to be that to do so would be to require a "standard of proof . . . most ill-suited for ascertainment by courts" (p. 16). Yet is this not a task which the Courts have coped with successfully over many years and in many cases under the Sherman Act? Surely a trial court is no more ill equipped to determine whether contracts may have the effect of substantially lessening competition than it is to determine whether business practices, often detailed and complex, are in restraint of trade under the Sherman Act's rule of reason.

IV.

The Court's Interpretation of Section 3 of the Clayton Act Disregards the Court's Previous Decisions Interpreting Identical Language ("Substantially Lessen Competition") Found in Sections 2(a) and 7 of the Clayton Act.

It is respectfully urged that the Court's interpretation of the "effect" clause in Section 3 of the Clayton Act is in conflict with the interpretation given by the Court to identical language found in Sections 2(a) and 7 of the Clayton Act.[7]

In *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, dealing with Section 2(a), it was apparently recognized that there must be some factual showing that the alleged discriminatory discounts might substantially lessen competition.

In *International Shoe Co. v. Commission*, 280 U. S. 291, dealing with Section 7, the Court expressly approved *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81, 87, which had held that a factual showing was necessary in order to show substantial lessening of competition.

What is the effect of the Court's opinion herein upon a case involving either Section 2(a) or 7 of the Clayton Act (where identical statutory language is used)? Suppose the same rule here laid down is applied to one who "directly or indirectly" makes a different price to different

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[7]Section 2(a) of the Clayton Act (38 Stat. 730 as amended by 49 Stat. 1526; 15 U. S. C. sec. 13) makes price discriminations under certain conditions unlawful "where the effect of such discrimination *may be substantially to lessen competition* or tend to create a monopoly

Section 7 of the Clayton Act (38 Stat. 731; 15 U. S. C. sec. 18) forbids certain stock acquisitions where the effect "*may be to substantially lessen competition* . . . or tend to create a monopoly

of the contract supplier to sell him his requirements. The dealer cannot have a requirements contract which will leave it optional with the dealer to buy from some third party and still have an enforceable obligation against the contract supplier.

So the Court's remark that "if . . . it is important to retail dealers to assure the supply *of their requirements* by obtaining the commitment of a single supplier to fulfill them, competition . . . . should enable them to insist *upon such an arrangement* without binding them to refrain from looking elsewhere," presents nothing in the way of a legally practicable solution. How can the dealers legally insist upon "such an arrangement" (*i. e.*, requirements contracts) and still retain the right of "looking elsewhere"? The Court strikes down a practice fraught with vital benefits to the small dealers, and offers them nothing which will preserve such benefits.

Respectfully submitted,

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Certificate of Counsel.

We, counsel for petitioner, certify that the foregoing petition is presented in good faith and not for delay, and that in our opinion it is well founded.

Marshall P. Madison

MARSHALL P. MADISON.

John M. Hall

JOHN M. HALL.